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THE EMPLOYERS' Edge BULLETIN

More Changes in the Temporary Employment Industry?

Coming on the heels of recently passed legislation that will alter the relationship between staffing agencies, their clients and workers (our March, 2009 E-Bulletin discussed the Bill as introduced), a recent decision of the Ontario Labour Relations Board (the "Board") may have broken new ground with respect to defining the relationship when it involves unions.

In its recent decision in PPG Inc., the Board appears to take a new approach to defining the employer in a union organizing situation. This was a case involving the United Food and Commercial Workers International Union (UFCW Canada) (the "UFCW"), Liberty Staffing Services Inc. ("Liberty"), its client PPG Canada Inc. ("PPG") and, peripherally, The Staffing Edge Inc. ("TSE"). UFCW organized a group of employees. PPG and Liberty asserted that that the employer of those employees was Liberty, while the UFCW argued that the employer was PPG. However, the UFCW also applied to the Board for a finding that, regardless of who was found to be the employer, PPG, Liberty and TSE were related companies and, therefore, should be declared to constitute one employer for the purposes of the *Labour Relations Act, 1995* (the "*LRA*").

In such instances, the Board's traditional analysis begins with an examination of the question of "who is the employer?" The Board uses a host of factors to make this determination. The intention is to ensure that the Union's certification is with respect to the "true" employer of the employees at issue.

In PPG Inc., however, the Board appeared to focus instead on a new application of the related employer criteria that the Board has traditionally applied. Traditionally, to find that two or more companies are "related" the Board has to determine whether there are: (i) two or more entities (ii) under common control or direction; and (iii) in associated or related activities or businesses.

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In most instances, the Board determines the question of common control or direction vis-à-vis the entire business(es) of the "related" companies. However, in this case the Board appears to have focused on the fact that the operations of PPG and Liberty were intertwined at the singular location at which the organizing drive occurred. It was the fact that labour relations functions between the two companies were intertwined at this work site which gave rise to the finding of relatedness, a focus which seems to be more narrow than the view the Board has typically taken in the past. Because PPG and Liberty's operations were intertwined at Liberty's work site, the Board effectively found them to be co-employers and, therefore, subject to certification.

This decision clearly raises concerns for staffing agencies and their clients. Even though the agency and client may not have any common control or direction in their overall operations, they may still be found to be "co-employers" at a particular work site and may both therefore be subject to certification. As a consequence, it may no longer be necessary to determine which entity is the "true employer" of the target employees.

It remains to be seen whether this decision is, and will remain, an anomaly based on the particular facts of the case, or whether this represents a new direction in the Board's view of the relationship between staffing agencies and their clients. Crawford Chondon & Partners LLP will continue to monitor with interest the developments in this area of the law.